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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re KEVIN M., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. KEVIN M., Defendant and Appellant.	A141923 (Solano County Super. Ct. No. J42057)

Kevin M., who was already a ward of the juvenile court, admitted possessing a knife on school grounds (Pen. Code, § 626.10, subd. (a)), whereupon the juvenile court admitted him to probation upon specified conditions. The validity of certain of those conditions is the primary subject of this timely appeal.

A lesser problem can be addressed at the outset. The court fixed a maximum period of confinement, but the parties agree this was improper because the minor was not committed to a place of confinement, but was placed in the custody of his parents. The parties also agree that the remedy is to strike this language from the order of probation, which will be ordered.

Turning to the probation conditions, the governing principles are well established:

"When a ward . . . is placed under the supervision of the probation officer . . . , the court may make any and all reasonable orders for the conduct of the ward . . . . The court may impose and require any and all reasonable conditions that it may determine fitting and proper to . . . the reformation and rehabilitation of the ward . . . ." (Welf. & Inst. Code, § 730, subd. (b).) In distinguishing the permissible scope of discretion granted to a juvenile court, as opposed to a criminal court for adults, our Supreme Court has advised that " '[a]lthough the goal of both types of probation is the rehabilitation of the offender, "[j]uvenile probation is not, as with an adult, an act of leniency in lieu of statutory punishment . . . ." [¶] In light of this difference, a condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court. . . . [N]o choice is given to the youthful offender [to accept probation]. By contrast, an adult offender "has the right to refuse probation, for its conditions may appear to the defendant more onerous than the sentence which might be imposed." [Citations.]' [Citation.]" (*In re Sheena K.* (2007) 40 Cal.4th 875, 889.)

This court has recognized that " '[e]ven where there is an invasion of protected freedoms, "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." ' [Citation.] This is because juveniles are deemed to be 'more in need of guidance and supervision than adults, and because a minor's constitutional rights are more circumscribed.' [Citation.] " (*In re Victor L.* (2010) 182 Cal.App.4th 902, 910 (*Victor L.*).)

Still, "[a] probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness. [Citation.] A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad. [Citation.]" (*In re Sheena K.*, *supra*, 40 Cal.4th 875, 890.)

Lastly, we note that a minor's failure to object or protest the conditions at the time they were imposed does not preclude review if the challenge presents a pure issue of law that may be resolved without reference to the sentencing record and if "easily remediable on appeal by modification of the condition." (*In re Sheena K.*, *supra*, 40 Cal.4th 875, 887–889.)

With these principles in mind, we examine each of the three conditions the minor challenges as vague and overbroad.

"[The Minor shall not] possess any weapons [or] ammunition. Minor is prohibited from owning or possessing a firearm until the age of 30 years pursuant to Penal Code [section] 29820(b). Other: including knives."

"5. The Minor shall not post, display, or transmit through a computer, cellular phone or other means of electronic communication any symbols, photographs or other information that the Minor knows to be, or that the Probation Officer informs the Minor to be, gang-related.

"6. The Minor shall not wear any known or identified gang-related clothing or emblems. Can wear red or blue but no emblems."

The minor aims two shafts at the first condition: "First, the court's prohibition on weapon possession does not include a knowledge element. Second, the court's prohibition on weapons use does not designate a deadly or dangerous weapon or specify the intent to use an otherwise benign item as a dangerous weapon."

The parties' briefs demonstrate there is a split of authority as to whether an adult's probation condition must include an express knowledge requirement, or whether such knowledge is sufficiently implicit that no explicit requirement is required. (Cf. *People v. Freitas* (2009) 179 Cal.App.4th 747, 752 ["it is appropriate to modify the probation condition to specify that defendant not *knowingly* possess [firearms or ammunition]"] with *People v. Rodriguez* (2013) 222 Cal.App.4th 578, 590 & 591 [condition prohibiting possession of "any firearm, ammunition, or any deadly or dangerous weapon" contains "implicit scienter requirements, and due process does not require making them explicit"];

People v. Moore (2012) 211 Cal.App.4th 1179, 1189 [same]; *People v. Kim* (2011) 193 Cal.App.4th 836, 843 [same].)

Were the issue presented for the first time, we might well align ourselves with the majority of courts that do not require an explicit knowledge requirement. If that is the rule for adults, it would seem to be even more so for juveniles, because, as already noted, the scope of minors' rights are reduced while the scope of judicial discretion in framing conditions is greater. On the other hand, a minor's rights may be reduced, but the need for unambiguous guidance is greater. However, we are not compelled to resolve the tension between these approaches, as this terrain is not new to us.

In *Victor L.*, *supra*, 182 Cal.App.4th 902, we modified a juvenile's probation condition so that it provided: "The Minor shall not remain in any building, vehicle or in the presence of any person where *the Minor knows one or more* dangerous or deadly weapons or firearms or ammunition exist." (*Id*. at pp. 912–913, 931, original italics.) Although the Attorney General labors to distinguish *Victor L.*, she concedes the minor's second point—"that the term 'weapons' is unconstitutionally vague because it includes inherently dangerous weapons designed for violence as well as common items having a lawful purpose that can be used to inflict harm." The minor argues that "The remedy is simple. This Court should modify the condition to prohibit appellant's control and custody of *concealable, deadly or dangerous* weapons." (Original italics.) The Attorney General is agreeable to this modification.

Our solution is to look to another condition, obviously drafted to satisfy *Victor L.*, which provides: "3. The Minor shall not be present in any building, vehicle or be in the presence of any person or persons whom the Minor knows possesses a firearm, ammunition or other dangerous or deadly weapons." Here is an express knowledge requirement, language correcting the vagueness of "weapons," and the obvious form to follow. This arguably opens the possibility that the minor could face violation for unknowingly possessing contraband, but not for unknowingly associating with a person in possession of a prohibited item. Such a possibility may be only theoretically possible,

but out of an abundance of caution we will prevent it becoming reality. Therefore, the first condition will be modified with language parallel to condition 3.

The minor next attacks conditions 5 and 6 because each contains a prohibition tied to "gang-related." He argues: "The gang terms . . . are facially vague as a matter of law because the terms 'gang-related clothing or emblems' and gang-related 'symbols, photographs and other information' fail to provide fair notice of which items of attire or electronically transmitted information are prohibited. Because the conditions cannot be modified to provide sufficient notice, and because the court's purpose ['to discourage Kevin from associating with gang members or ultimately joining a gang himself'] is served by the remaining gang conditions, conditions number 5 and 6 should be stricken."

The premise of this argument is flawed. Pegging a probation condition to what is "gang-related" is not an open-ended or unknowable standard. It does not encompass every collection or grouping of individuals, but addresses only what is spelled out in another condition, namely related to "a 'criminal street gang' as defined in Penal Code Section 186.22(f)." Condition 5 is clearly tied to "what the Minor knows to be, or that the Probation Officer informs the minor to be, gang-related," thus requiring a knowledge requirement and providing a means by which the minor can ascertain in advance what is off limits. As we said in *Victor L.*: "Such specification . . . not only reinforces the knowledge requirement, but also makes the condition of probation both clear enough to avoid a vagueness challenge and narrow enough to escape a claim of overbreadth." (*Victor L.*, *supra*, 182 Cal.App.4th 902, 918, fn. omitted; see *People v. Leon* (2010) 181 Cal.App.4th 943, 950–951, 954 [rejecting vagueness and overbreadth challenges to adult probation condition forbidding the possession, wearing, or displaying of "any clothing or insignia, tattoo, emblem, button, badge, cap, hat, scarf, bandanna, jacket, or other article of clothing that you know or that the probation officer informs you is evidence of, affiliation with, or membership in a criminal street gang"]; *People v. Lopez* (1998) 66 Cal.App.4th 615, 627–629 [upholding as not overbroad adult probation condition prohibiting the knowing display of "any gang insignia, moniker, or other markings of gang significance on his/her person or property as may be identified by . . . the Probation

Officer"].) The conditions are thus sufficiently precise for the minor " 'to know what is required of him.' " (*People v. Moore*, *supra*, 211 Cal.App.4th 1179, 1186.)

Victor L. is also instructive on condition 6. We accepted it as proper to limit a juvenile probationer's access to electronic media "in ways designed to minimize the temptation to contact his gang friends." (*Victor L.*, *supra*, 182 Cal.App.4th 902, 926.) It would be even more proper to attempt to prevent the minor from falling into the embrace of a gang, which the minor accepts as a legitimate goal.

However, the minor insists this means there is no " 'explicit standard' to those charged with monitoring [his] compliance," meaning "it depends on how the law enforcement officer interprets the prohibition on 'gang-related clothing' or 'transmission of other [gang-related] information.' " But a probationer is not entitled to demand Euclidian certainty in the abstract and in advance. Discretion can, as here, be entrusted to the probation officer to act in accordance with judicial directive. (See *In re Pedro Q.* (1989) 209 Cal.App.3d 1368, 1373.) The minor fears this discretion might be abused. So it might, but a mere possibility does not signify constitutional violation. Some of the most distinguished members of the United States Supreme Court have voiced the truism that "the possible abuse of a power is not an argument against its existence." (*Champion v. Ames* (1903) 188 U. S. 321, 363 (Harlan, J.); *Hamilton v. Kentucky Distilleries & Warehouse Co.* (1919) 251 U.S. 146, 161–162 (Brandeis, J.); see *Martin v. Mott* (1827) 25 U.S. 19, 32 (Story, J.) ["It is no answer that a power may be abused, for there is no power which is not susceptible of abuse."]; *Lin Sing v. Washburn* (1862) 20 Cal. 534, 578 ["The fact that a power may be abused is no evidence that it does not exist"].) This was the approach in *In re R. P.* (2009) 176 Cal.App.4th 562, 569, where the court noted that "the mere possibility peace officers may attempt to enforce the probation condition as a strict liability offense does not render the condition unconstitutional." The minor would require every possible usage to be anticipated by the court and spelled out in a probation condition. We reject this unrealistic approach because it makes no allowance for the flexibility necessary for a probation system to operate.

If police insist upon unreasonable interpretations of the conditions, it does not necessarily follow that the probation officer will use them as violations to seek revocation of the minor's probation. And if the probation officer does insist upon an unreasonable interpretation of the conditions, it does not necessarily follow that the court will accept them as violations justifying revocation of the minor's probation. We further note that the prohibition on Internet and electronic communication is not absolute, something we found objectionable in *Victor L*. (See *Victor L*., *supra*, 182 Cal.App.4th 902, 925.)

The order of probation is modified by striking the language fixing the maximum period of confinement. The condition of probation found on page 91 of the clerk's transcript is modified to provide: "The Minor shall not knowingly possess any knife, any concealable, deadly or dangerous weapon, or any ammunition. The Minor is prohibited from owning or possessing any firearm until the age of 30 years pursuant Penal Code [section] 29820(b)." As so modified, the order of probation is affirmed.

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Richman, J.

We concur:

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Kline, P.J.

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Stewart, J.